

10-22-2012

# Sky Canyon Properties, LLC v. The Golf Club at Black Rock, LLC Appellant's Brief Dckt. 39831

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IN THE SUPREME COURT OF THE STATE OF IDAHO

SKY CANYON PROPERTIES, LLC, an Idaho  
limited liability company; ROBERT C.  
SAMUEL; JOE K. DONALD AND LISBETH  
LILLEMORE DONALD, husband and wife;  
WAYNE A. GIANOTTI AND CAROLYN M.  
GIANOTTI, Trustees of the Gianotti Revocable  
Trust U-A dated January 29, 1991; RUSSELL  
M. WICKS AND EVELYN L. WICKS,  
husband and wife; BUDDY C. STANLEY  
AND JUDITH L. STANLEY, Trustees of the  
Stanley Family Trust dated February 26, 2004;  
CRAIG R. FALLON AND M. ELLEN  
FALLON, husband and wife,

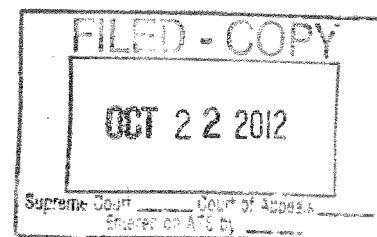
Plaintiffs/Counter-defendants/Appellants,

vs.

THE GOLF CLUB AT BLACK ROCK, LLC,  
an Idaho limited liability company,

Defendant/Counterclaimant/Respondent.

Supreme Court  
Docket No. 39831-2012



APPELLANTS' OPENING BRIEF

Appeal from the District Court of the First Judicial District  
of the State of Idaho, in and for the County of Kootenai

\* \* \* \* \*

Honorable John T. Mitchell, District Judge, Presiding

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## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

This case is an appeal from the Idaho District Court for the First Judicial District Court, Kootenai County, that centers around a dispute over the exercise of Declarant Rights pursuant to the Declaration of Covenants, Conditions and Restrictions for Coeur d'Alene Black Rock. Appellants Sky Canyon Properties, LLC, Robert C. Samuel, Joe K. Donald and Lisbeth Lillemore Donald, Wayne A. Gianotti and Carolyn M. Gianotti, Russell M. Wicks and Evelyn L. Wicks, Buddy C. Stanley and Judith L. Stanley, and Craig R. Fallon and M. Ellen Fallon (collectively "Sky Canyon") are all residential lot owners in the Black Rock development and members of Black Rock Homeowner's Association, Inc.

Respondent The Club at Black Rock, LLC ("Golf Club") is the owner of a golf club and other recreational property within the Black Rock development. The Golf Club claims status as the Successor Declarant of Black Rock and, accordingly, asserts the right to authority to exercise Declarant Rights, including the right to unilaterally control the Association.

Sky Canyon challenges the Golf Club's status as Successor Declarant on the grounds that the Golf Club does not meet the required qualifications set forth in the Declaration, and it is therefore not entitled exercise of Declarant Rights. The plain language of the Declaration prohibits assignment of Declarant Rights unless the assignee takes title to real property in the Black Rock development in a bulk purchase with the intent to develop and sell the real property acquired.

Both parties sought declaratory relief on the issue of whether the Golf Club qualified as Successor Declarant, and cross-motions for summary judgment were brought before the district court. Sky Canyon appeals the district court's ruling on summary judgment that the Golf Club

qualifies as a Successor Declarant under the language of the Declaration, and it also appeals the district court's denial of summary judgment in its favor on this issue.

## II. STATEMENT OF FACTS

Black Rock is a residential real property development located in Kootenai County, Idaho. Black Rock's developer, Black Rock Development, Inc. ("BRD"), obtained approval from Kootenai County for the Black Rock planned unit development ("PUD") pursuant to an Order of Decision by the Board of County Commissioners dated May 10, 2000. R. Vol. III, p. 910–25. A modified Order of Decision was issued on December 20, 2000. *Id.* p. 926–44. The PUD approved a residential development with a golf course. *Id.* p. 927, at § 2.03.

BRD moved forward with development of Black Rock by recording the Covenants, Conditions and Restrictions for Coeur d'Alene Black Rock ("Declaration") on July 31, 2001 as Kootenai County Instrument No. 1689309. R. Vol. I, p. 351–91, 408–44. The Declaration governs the real property that makes up the Black Rock Project (or "Project"<sup>1</sup>) and it defines the scope of the real property within the Project ("Property") as follows:

Includes the property described on **Exhibit "A"** and initially subjected to this Declaration, and also refers to any Expansion Property that may be incorporated in the Project from time to time and made subject to these Covenants pursuant to the provisions of this Declaration.

*Id.* p. 367, at § 2.47.

The Black Rock Project was expressly intended to be developed and sold as "a family oriented residential development," but as mentioned *supra*, the PUD also approved inclusion of a golf course. *Id.* p. 361. The Declaration acknowledged the inclusion of a golf course by designating a portion of the Property as "Club Property":

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<sup>1</sup> "Project" is a defined term in Section 2.46 of the Declaration. R. Vol. I, p. 367, defined as the Community created by the Declaration.

**2.17. Club Property.** Means all of the real property owned by [The Club at Black Rock, L.L.C.] or its successors or assigns plus all of the recreational and social facilities and maintenance facilities constructed thereon, which will be operated by the Club or its successors or assigns and commonly known as The Club at Black Rock, including without limitation, the golf course, the golf clubhouse, golf practice facilities, golf maintenance facilities, tennis courts, swimming pool, private beach, and any other recreational facilities offered by the Club. THE CLUB PROPERTY IS NOT COMMON AREA.

*Id.* p. 363, at § 2.17; *see also id.* at § 2.16.

In addition to defining the scope of the Black Rock Project, the Declaration also provided for the formation of the Black Rock Homeowner's Association, Inc., an Idaho nonprofit corporation ("Association"). All lot owners in the Black Rock Project are members of the Association. *Id.* p. 368, at Art. IV. The Association is responsible for the administration and operation of the Black Rock Project subject only to the rights and obligations of the Declarant and the other owners. *Id.* at § 4.2. The Declaration named BRD as the Declarant of the Black Rock Project, and it sets forth the scope of the Declarant Rights. *Id.* p. 364, at § 2.22. Among other rights, BRD retained the exclusive power during the "Period of Declarant Control" to appoint, remove and replace Directors and Officers of the Association. *Id.* p. 368, at § 4.3. The "Period of Declarant Control" began on July 31, 2001 and lasts until

the earlier of: (a) the date which is 20 years later, or (b) the date on which the Declarant has recorded the plats of all Expansion Property and sold 90% of the Lots to Owners other than Declarant or Builder in each of the Plats.

*Id.* at 366, at § 2.43. At the expiration of the Period of Declarant Control, the right to appoint, remove and replace Directors of the Association vests in its members; provided, however, the owner of the Club Property shall retain the right to appoint, remove and replace one (1) Director of the Association. *Id.* p. 368, at § 4.3.

On August 16, 2001, a plat of the Black Rock Project was filed and recorded in the Office of the Kootenai County Recorder. *Id.* p. 129–39. The real property described in the plat is

the same as that defined in the Declaration as the “Property.” First through Eighth Additions to the Black Rock plat were subsequently filed and recorded. *Id.* p. 241–92. Thus the Declaration was recorded and disclosed in the public record when the Appellants purchased platted lots in the Black Rock Project.

The Club at Black Rock, L.L.C. developed the Club Property as an 18-hole championship golf course designed by James Engh on the Club Property, as well as golf practice facilities. *Id.* p. 3, at ¶ 20; *id.* p. 5, at ¶ 34; *id.* p. 21, at ¶ 20; *id.* p. 113–15. The Club Property also included a 31,000 square foot clubhouse featuring private dining, health and fitness facilities, a golf shop, men’s and women’s locker rooms, tennis courts, swimming pool and Jacuzzi. Waterfront Club Property included The Beach Club on Lake Coeur d’Alene. *Id.* p. 3, at ¶ 20; *id.* p. 5, at ¶ 34; *id.* p. 21, at ¶ 20; *id.* p. 113–15.

Subsequent to the development of the Club Property, on August 20, 2010 the Club at Black Rock, L.L.C. executed and delivered a deed in lieu of foreclosure conveying its real property in Black Rock (i.e. the Club Property) to Washington Trust Bank (“WTB”). *Id.* p. 294–308. On this same date, BRD executed an assignment of Declarant Rights in favor of WTB. *Id.* p. 309–22. The Club Property conveyed to WTB included:

1. Waterfront property on Lake Coeur d’Alene (Lot 1, Block 15, Black Rock plat);
2. Golf course holes 1–9 and 16–18 (a portion of Tract A, Black Rock plat);
3. Golf course holes 10–15 (a portion of Tract C, Seventh Addition to Black Rock plat and Lot 1, Block 11, Black Rock Plat);
4. The clubhouse (Lot 1, Block 8, Fifth Addition to Black Rock plat); and
5. A portion of Kimberlite Drive, which is the road leading to the clubhouse (a portion of Tract C, Black Rock plat).



*Id.* p. 90–91.

On August 23, 2010, WTB assigned the Non-Merger Warranty Deed in Lieu of Foreclosure to West Sprague Avenue Holdings, LLC (“West Sprague”). *Id.* at 393–405. On October 29, 2010, West Sprague conveyed the Club Property to the Golf Club. *Id.* p. 327–35. That same day WTB executed an Assignment of Declarant Rights to the Golf Club. *Id.* p. 406–07. On November 5, 2010, BRD executed a Conditional Assignment of Declarant Rights wherein it assigned to the Golf Club any Declarant rights it may have retained after its assignment to WTB on August 10, 2010. *Id.* p. 337–50.

Pursuant to these conveyances and assignments, the Golf Club claimed status as the Successor Declarant and sought to exercise Declarant Rights as set forth in the Declaration, which would give it powerful rights over each member of the Association.<sup>2</sup> These rights include but are not limited to:

- The right to appoint officers and directors of the Association, *id.* p. 368, at § 4.3;
- The right to cast ten (10) votes per lot owned, *id.* p. 369, at § 5.2.3;
- The right to appoint the members of the Design Committee, *id.* p. 377, at § 10.2;
- The right to appoint directors of Black Rock Utilities, Inc., the utility provider of water and sewer services to the Black Rock Project, *id.* p. 382–87, at Art. XI; and
- The right to amend the Declaration, *id.* p. 437, at § 26.2.2.

Appellants, as members of the Association, object to the Golf Club’s exercise of Declarant Rights over the entire Black Rock Project on the grounds that it does not qualify as Successor Declarant. The Declaration places limits on who may be the assignee of Declarant Rights, and therefore places limits on who may qualify as a Successor Declarant:

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<sup>2</sup> The PUD approved the Black Rock Project for 381 single-family dwellings. R. Vol. III, p. 927. Thus, there at least 381 potential members of the Association all subject to the control of the singular Golf Club.

27.7. **Assignment.** Declarant may assign all or any part of the Special Declarant Rights or any of Declarant's other rights and reservations here under to any successor who takes title to all or part of the Property in a bulk purchase for the purpose of development and sale. Such successor will be identified, the particular rights being assigned will be specified, and, to the extent required, concomitant obligations will be expressly assumed by such successor, all in a written instrument duly recorded in the records of the Recorder of Kootenai County, Idaho.

§ 27.7.

### **III. COURSE OF PROCEEDINGS BELOW**

Sky Canyon filed suit in Kootenai County District Court on April 1, 2011 seeking a declaratory judgment pursuant to Idaho Code § 10-1201 that the Golf Club does not qualify as a Successor Declarant under the Declaration and shall not exercise the rights of the Declarant as provided in the Declaration. *Id.* p. 1–6. The Golf Club answered and counterclaimed for declaratory relief that it does qualify as a Successor Declarant under the Declaration and is entitled to exercise the rights of the Declarant. *Id.* p. 18–28.

The parties filed cross-motions for summary judgment that went before the district court for hearing on November 16, 2011. *Id.* p. 79–99; R. Vol. II, p. 447–65. Sky Canyon's argument was based on the language of Section 27.7 which places a clear limitation on who can qualify as a Successor Declarant—someone who “takes title to all or part of the Property in a bulk purchase for the purpose of development and sale,” as well as deposition testimony by the Golf Club's managing member Roger Rummel that:

- The Golf Club purchased the Club Property “for the purpose of developing and selling memberships and the property, number one. Number two, if that was not possible, we reserved the right to sell the property for other purposes.” R. Vol. I, p. 113 at 6:21–25 to 7:1.
- The sales were of “[m]emberships at the Golf Club.” *Id.* at 7:2–4.
- These memberships were essentially “country club” memberships. *Id.* at 7:5–6.
- There were several different categories of memberships. *Id.* at 7:7–12.

- The Golf Club has sold 172 memberships in the golf club. *Id.* at 7:13–15 as corrected by the Errata Sheet dated September 30, 2011.
- Prior to acquiring the property, the Golf Club made an effort to get new members to join the golf club. *Id.* at 8:10 as corrected by the Errata Sheet dated September 30, 2011; *Id.* p. 115, at 10:19–25.
- Prior to acquiring the property, the Golf Club distributed a membership agreement. *Id.* p. 113, at 8:15–17.
- Prior to acquiring the property, the Golf Club set up an escrow account to take deposits from future members. *Id.* at 8:18–20.
- At the time Club Property was purchased, it was developed. *Id.* at 9:2–4.
- At the time Club Property was purchased, “it was—the intent for was to become a golf course, but we certainly reserved the right to, if it didn’t pan out as a golf club, that we would figure out some future use for it.” *Id.* p. 115, at 10:15–18.
- After acquiring the Club Property, the Golf Club continues to solicit new members for the Golf Club. *Id.* at 11:1–9.
- The Golf Club has no plans to “develop and sell” the Club Property because “[w]e’ve only owned the property for eight months so, you know, we really haven’t gotten into it at that point (sic).” *Id.* at 11:12–17; *id.* p. 116, at 14:13–17.
- The Golf Club would change the use of the land but “[t]he only time that would come into play is if the golf course doesn’t survive.” *Id.* p. 115, at 12:1–3.
- The use of the Club Property would change “at the point in time that—at the point in time that we either didn’t have enough members to pay the bills or it was—or it would become unsuccessful, if memberships would decline to pay assessments, if that was a necessity.” *Id.* p. 117, at 21:11–15.
- The Golf Club purchased the Club Property as “an investment on the part of the Golf Club at Black Rock for the purpose of development and sale of the property and membership agreements or memberships.” *Id.* p. 118, at 26:16–19 (emphasis added).
- The Golf Club engaged in detailed negotiations over the terms of the membership agreement. *Id.* at 29:16–25 to 30:7.
- The Golf Club agreed to grant the Members a right of first refusal so that “if the current investor group decided to sell the property that the existing members would have the right to first refusal to purchase it.” *Id.* p. 119, at 31:5–10.
- The Golf Club will sell the Club Property “at the point in time that we can get it profitable, it would be our intentions to offer it up to the membership to buy. That would be our intentions.” *Id.* at 34:3–9.
- If the golf club was profitable, the Golf Club intends to “continue to run it.” *Id.* at 34:10–17.

- “The primary goal was, yes, to keep the club operating, but also, from an investor standpoint, to be able to have the ability if it wasn’t to sell it as anything we wanted to sell it as. If we wanted to sell it as a circus, we could do that.” *Id.* p. 121, at 38:15–22.
- “But for sure, our number one intention is to, you know, remain as a golf club. But if that’s—if that wasn’t available, then we would do something else.” *Id.* p. 122, at 44:11–13.

Sky Canyon argued that the term “Property,” as used in Section 27.7, was necessarily limited to the real property defined in Section 2.47. *Id.* p. 93–97. As a result, the Golf Club’s purchase of the Club Property for the purpose of developing and selling golf club memberships and operating a golf club did not qualify the Golf Club as the Successor Declarant. Sky Canyon also argued that the Golf Club’s purchase of the Club Property was not a “bulk purchase” because that the Club Property had already been platted and developed for a specific purpose, and thus it was not acquired for the purpose of development and sale. *Id.* p. 90–93.

In support of its motion, the Golf Club admitted that “[t]here is no issue of fact that it was the Golf Club’s desire to develop and sell memberships in and to the ‘Club Property’ on terms acceptable to all in order to create a vibrant and collegial golf course and recreational community atmosphere.” R. Vol. II, p. 463. However, it contended that development and sale of golf course memberships satisfied Section 27.7’s requirement that the Property be acquired for the purposes of development and sale. *Id.* The Golf Club also contended that, because the Declaration did not restrict the uses for the Club Property, the Golf Club had the ability to redevelop the Club Property if operation of a golf club was not successful, and that this also satisfied Section 27.7. *Id.* Finally, the Golf Club contended that the assignment of Declarant Rights assigned the right to purchase Expansion Property, which could then be developed and sold. *Id.*

The cross-motions for summary judgment went on for hearing before the district court on November 16, 2011. R. Vol. III, p. 754. In a written decision filed on December 13, 2011, the

district court denied summary judgment in favor of Sky Canyon and granted summary judgment in favor of the Golf Club, ruling that the Golf Club qualified as the Successor Declarant. *Id.* p. 752–72. When construing Section 27.7, the district court held that the section “is not limited by its terms to only ‘real’ property,” and that Sky Canyon’s argument to the contrary was unreasonable. *Id.* p. 764. On this basis, the district court ruled that the Golf Club’s acquisition of the Club Property for the operation of a golf club satisfied the requirements of Section 27.7. *Id.* p. 765. It also ruled that the Golf Club’s ability to sell the Club Property “if the sale of membership did not pan out” also satisfied Section 27.7. *Id.* p. 767.

Sky Canon moved the district court to reconsider its ruling on summary judgment, and a hearing on the *Motion for Reconsideration* was held on June 6, 2012. *Id.* p. 796–800, 962–73. The district court denied the motion for reconsideration in a written decision filed July 16, 2012. R. Aug. p. 59–77.

Final judgment was entered on February 8, 2012, and Appellants filed their Notice of Appeal on March 16, 2012. R. Vol. III, p. 786; *id.* p. 974–80. The parties stipulated to augmentation of the appellate record to include the pleadings filed after entry of the final judgment. *Stip. to Augment Clerk’s Record & Trs. on Appeal* (July 13, 2012).

### **ISSUES PRESENTED ON APPEAL**

1. Did the District Court err when it ruled that Property, as used in Section 27.7, was not limited to real property, without giving consideration to the Declaration’s express definition of “Property”?
2. Did the District Court err by ruling as a matter of law that the Golf Club qualified as Successor Declarant in light of its admission that it took title to the Club Property for the purpose of operating a golf club?

## **ARGUMENT**

The Golf Club does not and cannot qualify as Successor Declarant, and as a result it has no authority to exercise Declarant Rights under the Declaration. The role of the Declarant is inextricably and necessarily linked to the development and sale of real property within the Black Rock Project. For this reason, the plain language of the Declaration requires that any party seeking to exercise Declarant Rights must first qualify for the role by acquiring the Project's real property in a bulk purchase with the intent to develop and resell it. The only real property in the Project that the Golf Club took title to is the fully developed Club Property, which the Golf Club purchased for the purpose of operating a golf club. Because the Golf Club did not acquire title in a bulk purchase for the purpose of further development and sale, it is not qualified to be Successor Declarant, and it cannot exercise Declarant Rights. Accordingly, in the absence of a qualified Successor Declarant who will carry out further development and sale within the Black Rock Project, control of the Association must be turned over to the members as completed by the Declaration.

### **I. STANDARD OF REVIEW**

The appellate court reviews a grant of summary judgment under the same standard employed by the trial court. *Boise Tower Assocs. v. Hogland*, 147 Idaho 774, 215 P.3d 494, 499 (2009). "The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits." *Intermountain Forest Mgmt., Inc. v. La. Pac. Corp.*, 136 Idaho 233, 235, 31 P.3d 921 (2001). Summary judgment is proper "if the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to summary judgment as a matter of law." I.R.C.P. 56(c).

This court freely reviews the entire record before the district court to determine whether either side was entitled to judgment as a matter of law and whether inferences drawn by the district court are reasonably supported by the record. *P.O. Ventures, Inc. v. Loucks Family Irrev. Trust*, 144 Idaho 233, 237, 159 P.3d 870 (2008). In cases bound for a court trial, where the evidentiary facts are undisputed, the appellate court reviews the trial court’s resolution of any conflicting inferences by inquiring whether the record is sufficient to support the trial court’s findings. *Hoffer v. Callister*, 137 Idaho 291, 293–94, 47 P.3d 1261, 1263–64 (2002).

Here, the trial court erred in both granting the Golf Club’s motion for summary judgment and in denying Sky Canyon’s motion for summary judgment/reconsideration.

**II. SECTION 27.7 OF THE DECLARATION UNAMBIGUOUSLY STATES THAT A PARTY MUST PURCHASE REAL PROPERTY WITH THE PURPOSE OF FURTHER DEVELOPING AND SELLING IT IN ORDER TO QUALIFY AS A SUCCESSOR DECLARANT.**

Section 27.7 of the Declaration unambiguously sets forth the qualification for status as Successor Declarant to the Black Rock Project—a party must “take[] title to all or part of the Property in a bulk purchase for the purpose of development and sale.” “Property” is a defined term in the Declaration, and it is unambiguously defined as real property. It does not include personal property such as golf club memberships. Thus, the district court erred by holding that the Golf Club’s purpose of buying the Club Property in order to develop and sell golf club memberships satisfied the requirements of Section 27.7.

**A. The Plain Meaning of “Property” as Used in the Declaration is Limited to Real Property.**

It is undisputed that in order to qualify as a Successor Declarant to the Black Rock Project, the Golf Club must satisfy the requirements of Section 27.7. This appeal centers around the meaning of Section 27.7. When interpreting restrictive covenants such as the Black Rock

Declaration, a court must apply the rules of contract construction. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003). One of the most fundamental rules of contract construction is that the document “must be interpreted according to the plain meaning of the words used if the language is clear and unambiguous.” *Hill v. Am. Family Mut. Ins. Co.*, 150 Idaho 619, 622, 249 P.3d 812, 815 (2011). In this case, the Declaration provides definitions for a number of terms used through the document, and those definitions must be consulted when determining the plain meaning of the Declaration’s clauses and provisions, including Section 27.7.

Section 27.7 reads in its entirety:

27.7. **Assignment.** Declarant may assign all or any part of the Special Declarant Rights or any of Declarant’s other rights and reservations hereunder to any successor who takes title to all or part of the Property in a bulk purchase for the purpose of development and sale. Such successor will be identified, the particular rights being assigned will be specified, and, to the extent required, concomitant obligations will be expressly assumed by such successor, all in a written instrument duly recorded in the records of the Recorder of Kootenai County, Idaho.

R. Vol. I, p. 439 (emphasis added).

Section 27.7 clearly and unambiguously states that, in order to qualify as Successor Declarant, the assignee must take title to the Property in a bulk purchase for the purpose of development and sale.

“Property” is a expressly defined term in the Declaration, and thus when it is used throughout that document, it means certain real property, not personal property:

2.47. **Property.** Includes the property described on **Exhibit “A”** and initially subjected to this Declaration, and also refers to any Expansion Property that may be incorporated in the Project from time to time and made subject to these Covenants pursuant to the provisions of this Declaration.



*Id.* p. 367, at § 2.47. This definition is unambiguous. The plain language of Section 2.47 states that “Property” means one of two things either the property described on Exhibit A to the Declaration, or “Expansion Property.”

There can be no doubt that “Property” means real property. Exhibit A of the Declaration (which is found on pages 440–44 of the appellate record), is the legal description for the real property that makes up the Black Rock Project, and it is the same legal description contained on the first Black Rock plat filed with Kootenai County. R. Vol. I, p. 139. “Expansion Property” is also an expressly defined term in the Declaration, and it too is explicitly defined as real property:

2.31. **Expansion Property.** Such additional real property now owned or in the future acquired by Declarant (including any Successor Declarant) as Declarant may make subject to the provisions of this Declaration, by duly recorded Declaration of Annexation.

*Id.* p. 365, at § 2.31.

Despite these express definitions that identify “Property” as real property, the district court ruled that it would be unreasonable to exclude personal property from the definition of “Property” in Section 27.7 because to do so would create a limitation that is not supported by the express language. R. Vol. III, p. 764. This ruling was erroneous because the district court’s written decision gives no consideration whatsoever to the fact that the term “Property” has an expressly defined meaning in the context of the Declaration. Section 2.47 is a crucial cross-referenced when interpreting Section 27.7, but Section 2.47 was never cited by the district court in its written decision on summary judgment.

“In construing a written instrument, [courts] must consider it as a whole and give meaning to all provisions of the writing to the extent possible.” *Selkirk Seed Co. v. State Ins. Fund*, 135 Idaho 434, 18 P.3d 956 (2000). The district court failed to do this when it failed to consult the Declaration’s definitions of “Property” and “Expansion Property” when construing

the meaning of Section 27.7. The Declaration gives a clear directive that it is to be interpreted according to the express definitions set forth in Article 2, *see* R. Vol. I, p. 362, and the district court's failure to do so was a failure to interpret the Declaration according to its plain meaning.

Not only is it entirely reasonable to limit the meaning of "Property" in Section 27.7 to real property, a court is required to do so based on the express definition contained in Section 2.47. There is no ambiguity on this issue. The definition of "Property" is not subject to conflicting interpretations—it must mean only the real property described on Exhibit A or any additional real property actually acquired by someone with Declarant status. *See Murr v. Selag Corporation*, 113 Idaho 773, 781, 747 P.2d 1302, 1310 (Ct. App.1987) ("A contract is ambiguous if it is reasonably subject to conflicting interpretations.").

In light of the foregoing, it was error for the district court to rule that "Property" as used in Section 27.7 included personal property, and this ruling must be reversed as a matter of law.

B. The Plain Meaning of "Development and Sale" Means Development and Sale of the Acquired Real Property.

The plain meaning of Section 27.7 requires that any Successor Declarant must have taken title to real property, whether it be real property already in the Project or real property capable of being made subject to the Declaration (i.e., Expansion Property). The parties do not dispute that the Club Property qualifies as "Property." However, this alone is not enough to entitle the Golf Club to achieve Successor Declarant status. Section 27.7 requires more than mere acquisition of real property—it requires that the acquisition be for the purpose of development and sale of the acquired real property. R. Vol. I, p. 439, at § 27.2.

This limitation comes directly from the plain language of Section 27.7—a qualified successor is one "who takes title to all or part of the Property in a bulk purchase for the purpose of development and sale." The Golf Club's development and sale of golf club memberships is

irrelevant to the question of whether it qualifies as Successor Declarant because it is the development and sale of the acquired real property that matters. The grammatical structure of Section 27.7 compels this interpretation. “Development and sale” are verbs, and by its definition a verb is a word “that expresses the action or indicates the state of being of the subject.” William Strunk Jr., and E.B. White, *The Elements of Style* 95 (4th ed. 2000). The only subject or noun in the sentence that the verbs “development and sale” could pertain is “the Property,” which as discussed *supra* is necessarily limited to real property.

Thus, the district court erred when it held that the Golf Club’s intent to develop and sell golf club memberships satisfied the requirements of Section 27.7. That section requires a qualifying Successor Declarant to acquire real property with the purpose of developing and selling said real property, and the district court’s ruling must be reversed as a matter of law.

C. A Reading of the Declaration as a Whole Also Compels the Conclusion That Section 27.7 Requires Development and Sale of Real Property, Not Personal Property.

Not only does the plain language of Section 27.7 compel a ruling that a qualifying Successor Declarant must acquire real property for the purpose of developing and selling said real property, the Declaration as a whole also compels that result. The district court failed to consider the meaning of Section 27.7 through the context of the Declaration as a whole, and that was reversible error. “[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.” *Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 718 P.2d 920, 927 n.7 (Cal. 1986); *see also Dille v. Doerr Distributing Co.*, 125 Idaho 123, 126, 867 P.2d 997, 1000 (Ct. App. 1993) (“The court must construe the contract as a whole and consider it in its entirety to determine whether it is subject to conflicting interpretations.”).

The Declaration is in essence a collection of restrictive covenants, and restrictive covenants by their very nature apply to real property. *See Independent School Dist. of Boise City v. Harris Family Ltd. Partnership*, 150 Idaho 583, 249 P.3d 382 (2011) (“The burdens imposed by restrictive covenants run with the land, i.e., they may be enforced against one who purchases real property with notice of the covenants.”); Black’s Law Dictionary (9th ed. 2009) (defining *covenant running with the land* as “[a] covenant intimately and inherently involved with the land and therefore binding subsequent owners and successor grantees indefinitely.”).

The entire purpose of restrictive covenants like the Declaration is to address the use of real property, not personal property. The preamble to the Declaration reinforce this by discussing its applicability in terms of real property:

Declarant hereby adopts the following Covenants, Conditions and Restrictions for the Black Rock Planned Unit Development and any additions (hereinafter referred to as the “Project” located at the Property), and declares that the following shall apply to the subject Property and to any interest in that Property. These Covenants, Conditions and Restrictions (“Declaration”) shall run with the land, and with each estate therein, and shall be binding upon all persons having or acquiring any right, title or interest in said real property or any Lot, parcel or portion thereof; and shall inure to the benefit of and be binding upon Declarant, Declarant’s successors-in-interest, purchasers, assigns, heirs and any party having acquired any right, title or interest in or to any part of the subject Property until the Declaration is terminated.

R. Vol. I, p. 361.

Nowhere in this preamble, or elsewhere in the Declaration, is personal property made subject to the restrictive covenants; only real property is affected. This limitation must be considered when interpreting provisions throughout the entire body of the document, including those that address Declarant Rights.

It is apparent from the Declaration as a whole that Declarant Rights are intimately linked to the real property, specifically development and sale of the real property in the Project. Article 16 explicitly states that the Declarant has the right to complete improvements on the Property,

annex Expansion Property, create lots and Common Area, subdivide lots, and manage advertising and sales. *Id.* p. 422–23, at § 16.1.1–3. This connection to the real property is further evidenced by the defined “Period of Declarant Control,” which temporally limits the Declarant Rights based on the progress of real property development and sales:

2.43. **Period of Declarant Control.** The period beginning on the date this Declaration is first recorded in the office of the Recorded of Kootenai County, Idaho, and ending on the earlier of: (a) the date which is 20 years later, or (b) the date on which the Declarant has recorded the plats of all Expansion Property and sold 90% of the Lots to Owners other than Declarant or Builder in each of the Plats. When Declarant has determined that no additional property shall be considered Expansion Property, Declarant shall so notify the Association in writing. . . .

*Id.* p. 366, at § 2.43.

Read as a whole, the Declaration reveals that the Declarant’s role is to develop and sell the real property in the Project. It therefore naturally follows that anyone who seeks to be the Successor Declarant must enter that role with the ability and intent to carry out that same purpose. If a Successor Declarant could acquire the right to develop and sell the property without having any intent or purpose to do so, Section 2.43(b) would be rendered meaningless, and the only way to measure the end of the Declarant’s control would be to wait for twenty (20) years to expire.

Much of this appeal is concerned with interpreting Section 27.7 according to its plain meaning, but it must be remembered the ultimate issue at stake is whether the Golf Club is entitled to exercise the Declarant Rights and unilaterally control the entire Project, including all residential portions that can consist of up to 381 dwelling units. The Declaration as a whole reveals that the Declarant’s role is to carry out development and sale of real property within the Project. The fundamental role of the Declarant would be thwarted if qualifications for the role are not limited to this purpose. It was error for the district court to rule that Successor Declarant

status could be acquired by a party who merely intended to develop and sell personal property such as golf club memberships.

**III. THE GOLF CLUB DID NOT ACQUIRE THE CLUB PROPERTY FOR THE PURPOSE OF DEVELOPING AND SELLING THE CLUB PROPERTY AND THUS IT CANNOT QUALIFY AS THE SUCCESSOR DECLARANT.**

Both the plain meaning and overall purpose of Section 27.7 require that, in order to qualify as a Successor Declarant, a party must take title to real property within the Project for the purpose of developing and reselling that real property. In this case, the Golf Club did not take title to the Club Property for this purpose, and as a result, it cannot qualify as the Successor Declarant. No question of fact exists on this issue. The Golf Club has explicitly admitted through the testimony of its agent that it purchased the Club Property “for the purpose of developing and selling memberships.” R. Vol. I, p. 113, at 6:21–25 to 7:1. Only if that endeavor failed would the Golf Club consider other alternatives for the Club Property. Because the Golf Club did not intend to develop and sell the Club Property when it purchased it from WTB, it cannot qualify as the Successor Declarant and cannot exercise the Declarant Rights.

**A. The Golf Club’s Admitted Purpose in Purchasing the Club Property Was to Operate a Golf Club.**

The Golf Club’s admitted purpose in purchasing the Club Property was to operate a golf club and develop and sell golf club memberships. Indeed, the Golf Club’s name, The Golf Club at Black Rock, LLC, reveals its admitted and limited goal of operating a golf club. This is an undisputed fact in the record of this case as admitted by Roger Rummel. This admission by the Golf Club is fatal to its position, and it warrants that summary judgment be granted in favor of Sky Canyon.

The discussion set forth in Part II *supra* reveals that a Successor Declarant is one who acquires real property in the Project for the purpose of developing and reselling it. An intent to

develop and sell personal property is not sufficient. Furthermore, Section 27.7 requires a present intent, at the time of acquisition, to move forward with real property development and sales. It was erroneous for the district court to rule that this requirement was satisfied so long the Golf Club “purchased the property to later sell if the sale of [golf club] memberships did not pan out.” R. Vol. III, p. 767. The acquisition of Declarant Rights cannot be temporally separated from an intent to develop and sell real property—having such intent is what qualifies a party to be a Successor Declarant in the first place. Allowing the Golf Club to exercise Declarant Rights before it has the requisite intent to qualify as a Successor Declarant would be putting the cart before the horse.

After all, development and sale of the Project’s real property is a, if not the, crucial role of a Declarant. Declarant status ends when development and sale ends. *See* R. Vol. I, p. 366, at § 2.43(b). That is undoubtedly why Section 27.7 ensures that Declarant Rights will only be awarded to those who will continue with development and sale of the Project’s remaining real property. Without any present intent to develop and sell the real property, a party seeking Successor Declarant status could essentially invalidate Section 2.43(b) of the Declaration and force the Association’s members to wait twenty (20) years before they are able to gain control of the Association. The Golf Club is seeking Successor Declarant status now, despite the fact that it has no current intent to develop and resell the Club Property. This is not and cannot be permitted under the Declaration. What is relevant is the intent of the Golf Club at the time title was acquired, and that intent is mutually exclusive to development and sale of the Club Property.

The Golf Club purchased the Club Property as an already developed, finished unit, not as a “bulk purchase” to later be divided into smaller quantities during development and sold. The Club Property, at the time of purchase, consisted of a golf course, a clubhouse, golf practice

facilities, golf maintenance facilities, tennis courts, swimming pools, a private beach, and other recreational facilities. This developed property was purchased by the Golf Club for the admitted purpose of operating a golf course and selling memberships thereto. That does not satisfy the explicit requirements of Section 27.7, and thus the Golf Club cannot qualify as Successor Declarant as a matter of law. The district court erred when it ruled that the Golf Club's asserted contingent future purpose for purchasing the Club Property satisfied the requirements of Section 27.7. The evidence does not support a finding that the Golf Club acquired the Club Property for the purpose of further development and sale thereof.

B. The Club Property Was Already Fully Developed as a Golf Club and Other Recreational Facilities When the Golf Club Purchased It and Thus Could Not Have Been Purchased for Development and Sale.

Not only does the Golf Club's admitted purpose in purchasing the Club Property foreclose its claim to Successor Declarant status, the nature and use of the Club Property does as well. The Club Property is only a small portion of the Property as defined in Section 2.47, and it was fully developed as a golf club and golf course at the time the Golf Club acquired it. Redevelopment of this already developed Club Property would require extensive land use proceedings before the Kootenai County Board of Commissioners and Planning Commission, and nothing in the record indicates that the Golf Club has the intent to pursue such development and sale. This was the subject of Sky Canyon's *Motion for Reconsideration*, which the district court denied.

The Golf Club's inability to further develop and sell the Club Property stems from the fact that the Project as a whole is limited to and governed by the Kootenai County Board of Commissioner's Order of Decision approving the Black Rock PUD. The County approved the Black Rock PUD according to the terms proposed in the PUD application, which was as follows:



**2.03 Proposal:** The Applicant is proposing to construct an 18 hole public golf course, clubhouse/restaurant, pro shop, equestrian center, recreational center with swimming pool and tennis courts, leasing office, and other related structures and uses along with a maximum of 381 single family dwellings including 177 high-density residential units, to be platted through the County's subdivision process. The high-density homes may consist of zero lot line homes, condominiums, timeshares and/or pooled units.

R. Vol. III, p. 927.

Thus, the inclusion of a golf course was contemplated by the County when it granted approval for the Black Rock PUD, and the Club Property was designated as the location for this golf course. The Black Rock plat and each successive subdivision plat thereto identifies the location of the golf course on the Property. The Declaration also designates the Club Property as the location of a golf course and "open space or a recreational area for purposes of applicable zoning ordinances and regulations." R. Vol. I, p. 425, at § 17.2.1.

The inclusion of the golf course in the approved PUD is significant because to change the Club Property from a golf course would be a significant change to the approved PUD plan and the nine successive subdivision plats. Any significant change to an approved PUD plan and the effect on the nine subdivision plats would require extensive public hearings and ultimately Board of County Commissioners' approval. This is true regardless of which zoning ordinance is consulted—the one currently in effect or the one in effect at the time the PUD was approved. Even under the current zoning ordinance (which the Golf Club advocated for before the district court), the requirements are clear:

Significant changes in use, structures, lot or boundary lines, conditions of approval, and all other aspects of a final PUD Plan must be approved by the Board in accordance with the application, hearing and approval procedures for a new PUD.

R. Aug., p. 43, at § 9-15-11(B).

In order to move forward with development and sale of the Club Property in a format different from the current PUD and nine subdivision plats, the Golf Club would face significant obstacles, which at a minimum would require going through the public hearing process before the Board of County Commissioners. The record is completely void of any evidence indicating the Golf Club has made any steps in this direction. Thus, there is no evidence to support an inference that the Golf Club acquired the Club Property for the purpose of development and sale. As a result, the district court's denial of summary judgment to Sky Canyon on this issue must be reversed.

C. Granting the Golf Club Declarant Rights Does Not Comport with the Overall Scheme and Intent of the Black Rock Project.

The district court erred in its interpretation of Section 27.7 of the Declaration, but that provision cannot and should not be read in a vacuum. While Section 27.7 defines who may qualify as a Successor Declarant, merely holding that title is meaningless, and it is not the crux of this dispute. What is really at issue here is the power that goes along with being a qualified Successor Declarant—the authority to exercise Declarant Rights. Under the district court's ruling, the Golf Club has control over the Association, has control over Black Rock Utilities, Inc., and has the control to amend the terms of the Declaration, just to name a few. This concentration of power in the Golf Club is the motivating factor behind Appellants' involvement in this case.

“A declaration ‘is essentially a master deed which defines the rights and duties of the developer, the owners of the individual condominium units and the management body of the project.’” *Thompson v. Ebbert*, 144 Idaho 315, 317, 160 P.3d 754, 756 (2007) (quoting *Investors Ltd. of Sun Valley v. Sun Mountain Condos, Phase I, Inc. Homeowners Ass’n.*, 106 Idaho 855, 857, 683 P.2d 891, 893 (1984)). The Declaration in this case has a specifically stated purpose:

1.2. **Purpose.** The purpose of the Declarant in making this Declaration is to create a planned unit development known as Black Rock on the Property.

The Declarant further intends to ensure the attractiveness of the Property, including the residences and other improvements constructed on it; to prevent any future impairment of the Property and to guard against the construction on the Property of improvements of improper or unsuitable materials or with improper quality or methods of construction; to protect and enhance the values and amenities of the Property; to provide for the operation, administration, use and maintenance of the Common Areas within the Property; to preserve, protect and enhance the values and amenities of the Property; and to promote the health, safety and welfare of the owners of the Property.

R. Vol. I, p. 361–62, at § 1.2. The Declarant’s obligations in this regard extends to all portions of the Property, which is primarily residential in nature.

The Declarant’s primary purpose is to create the Black Rock Project, and the Declarant Rights reflect this. The Declarant is empowered with development rights and sales rights, inter alia. *Id.* p. 422–23, § 16.1.2–3. Prior to the Project’s completion, the Declaration is the one who has the authority to plat the Property into lots for sale to residential owners and complete improvements on the Property. *Id.* The Declaration contemplates that the land owned by the Declarant is owned for the purpose of constructing improvements to complete the Project:

**16.7. Declarant’s Right Incident to Construction.** Declarant, for itself and its successors and assigns, hereby retains a right and easement of ingress and egress over, in, upon, under and across the Common Area and the right to store material thereon and to make such other use thereof as may be reasonably necessary or incident to the construction of the Improvements on the Property or other real property owned by Declarant . . . .

*Id.* p. 425, § 16.7 (emphasis added).

The Declarant’s responsibility for development and sale of the Property is undoubtedly why Section 27.7 requires that any successor thereto take title in a “bulk purchase for the purpose of development and sale.” In order for the Declarant to be able to subdivide and construct improvements on the Property, it must first own land capable of such development—i.e., a “bulk” amount. In this sense, the term “bulk purchase” cannot be separated from the term

“development and sale.” Acquisition of property not suitable for subdivision and platting into individual or multiple residential lots for sale to multiple owners is not a bulk purchase.

Dividing and platting the Property into lots to be sold to residential lot owners is the expressed and primary role of the Black Rock Declarant. The evidence for this is found in the fact that the Declarant’s control lasts only so long as it owns the bulk of the lots in the Project—the Period of Declarant Control ends on “the date on which the Declarant has recorded the plats of all Expansion Property and sold 90% of the Lots to owners other than the Declarant or Builder.” Once the lots have been platted and sold, the Declarant’s control ends and the owners themselves take control of the Association. *Id.* p. 366, at § 2.43(b).

Merely owning Club Property, on the other hand, is not the role of the Declarant. The plain language of the Declaration identifies Club Property as property (initially) owned by The Club at Black Rock, L.L.C., not the original Declarant Black Rock Development, Inc. Yet ownership of Club Property is the only connection the Golf Club has to the Black Rock Community.

The Golf Club simply does not fit the mold of the Black Rock Declarant. Black Rock is a primarily residential community, and the Golf Club owns only Club Property, which the Declaration explicitly states is not residential—it is to be open space and recreational areas. *Id.* p. 425–26, at § 17.2.1. Not only that, but Club Property is intentionally separate from the remainder of the Community. It is not Common Area, and the Declaration goes to great lengths to state that lot owners have no rights to the Club Property. *Id.*

Not only is the Club Property land that was never intended for residential development, it is already fully developed as a private golf club, as the Declaration intended. It is not Black Rock Property that was intended to be owned in bulk and later divided into multiple lots to be sold to

multiple owners. The Declaration contemplated that the Club Property would be kept, undivided, as a cohesive whole by the Club at Black Rock, L.L.C, and that cohesive ownership by one entity continued after the Golf Club came into title.

Under these circumstances, granting the Golf Club authority to exercise Declarant Rights does not comport with the overall scheme and intent of the Black Rock Project because the Golf Club does not own any real property intended to be subdivided, platted, and sold. Thus the Golf Club did not take title in a bulk purchase for the purpose of development and sale.

The Declaration clearly contemplates that when there is no further development and sale to occur, the members will assume control of the Association. The conveyances and assignments in this case between BRD, WTB, West Sprague, and the Golf Club have upset the intended course of events for the Black Rock Project by purporting to assign Declarant Rights to a party with no desire or ability to carry out further development and sale. This is inconsistent with the overall scheme and intent of the Black Rock Project as set forth in the Declaration.

In the absence of a party capable and willing to carry out further development and sale of the Property, control of the Association must be passed to the members. No legitimate purpose is accomplished by allowing the Golf Club, who has no interest in developing any portion of the Project, to control the Association until the expiration of Section 2.43(a)'s twenty (20) year period.

### **CONCLUSION**

Possession of Declarant Rights places a party in a position of significant power within the Black Rock Project. Being cognizant of this, the Declaration imposes limits on who may possess those rights, and it does so through Section 27.7's express qualifications for Successor Declarant status. These qualifications ensure that Declarant Rights are assigned to those who can

and will perform the role of Successor Declarant in accordance with the Declaration's purpose. That purpose is to carry out the development and sale of real property within the Black Rock Project.

Pursuant to Section 27.7, only those who take title to real property in the Project pursuant to a bulk purchase made for the purpose of development and sale can meet these qualifications. This is supported by the plain language of Section 27.7. The only property referenced this section is real property, specifically the real property defined as "Property" in Section 2.47. The district court erred as a matter of law when it failed to give effect to this definition of Property and ruled that Section 27.7 also applied to personal property. Both the district court's grant of summary judgment to the Golf Club and its denial of summary judgment to Sky Canyon on this issue must be reversed.

The evidence from the Golf Club's own testimony establishes that it did not acquire real property in a bulk purchase for the purpose of development and sale. The Golf Club purchased a developed golf club in order to operate the real property as a golf club, not to subdivide, plat, and sell lots to subsequent owners. This disconnect between the Golf Club's intent and the role of the Declarant pursuant to the Declaration prohibits it from qualifying as Successor Declarant and exercising Declarant Rights. Because the evidence does support a finding that the Golf Club purchased the Club Property for the purpose of development and sale, both the district court's grant of summary judgment to the Golf Club and its denial of summary judgment to Sky Canyon were in error and must be reversed, and the final judgment must be vacated.

#### **REQUEST FOR ATTORNEY'S FEES**

"[C]osts can be awarded to the prevailing party on the appeal . . . ." *Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP*, 148 Idaho 479, 501, 224 P.3d 1068, 1090 (2009).

Appellate Rules 40 and 41, as well as the plain language of the Declaration. Section 24.8 of the Declaration provides:

24.8. **Recovery of Costs.** If legal assistance is obtained to enforce any of the provisions of the Black Rock Documents, or in any legal proceeding (whether or not suit is brought) for damages or for the enforcement of the Black Rock Documents or the restraint of violations of the Black Rock Documents, the prevailing party will be entitled to recover all costs incurred by it in such action, including reasonable attorneys' fees and legal assistants' fees as may be incurred, or if suit is brought, as may be determined by the court.

R. Vol. I, p. 435, at § 24.8.

This action was brought to enforce the Black Rock Documents, and thus Sky Canyon is entitled to an award of attorneys' fees as the prevailing party upon appeal.

DATED this 19<sup>th</sup> day of October, 2012.

LUKINS & ANNIS, P.S.

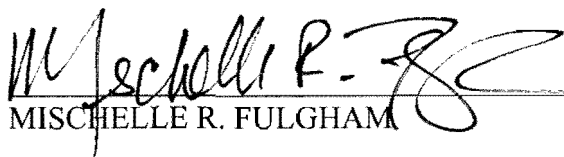
By:   
MISCHELLE R. FULHAM  
Attorneys for Appellants

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of October, 2012, I caused to be served two (2) true and correct copy of this APPELLANTS' BRIEF by the method indicated below, and addressed to all counsel of record as follows:

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| <input checked="" type="checkbox"/> | Electronic Mail             |

  
MISHELLE R. FULGHAM